Lee Thye @ Lee Chooi Yoke v Societe Generale Cawangan Singapura

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–715 OF 2003
MOHD GHAZALI, ABU SAMAH AND SULAIMAN DAUD JJCA
28 JULY 2009

Civil Procedure — Summary judgment — Appeal against — Adducing fresh evidence — Whether application to adduce fresh evidence in appeal should be allowed — Whether conditions under O 56 r 1(3A) of the Rules of the High Court 1980 had been satisfied — Whether fresh evidence would have had or likely to have had determining influence upon decision of SAR — Rules of the High Court 1980 O 56 r 1(3A)

By a letter of offer dated 24 July 1995, the plaintiff, a company incorporated in France with a branch office in Singapore, granted to the defendant, a Malaysian, a credit facility of US$7m ('the facility'), which facility was governed by the law of Singapore. The defendant agreed to the terms and conditions of the facility and duly signed the letter of offer ('the facility agreement'). When the defendant defaulted on the terms and conditions of the facility the plaintiff commenced an action to recover the amount outstanding under the facility with interest and costs. On 24 June 2002, the senior assistant registrar ('the SAR') granted summary judgment to the plaintiff for the amount claimed with interest and costs. The defendant appealed against that decision, which appeal was still pending. In the meantime, the defendant filed an application to adduce further evidence at the hearing of the appeal proper. The judge dismissed this application with costs and hence the present appeal. The evidence that the defendant sought to adduce was in the form of an affidavit, and made reference to a telephone conversation between the defendant and one Mary Goh, who was formerly the vice president, deputy head — private banking of the plaintiff. In her affidavit the defendant deposed that in the course of this telephone conversation Mary Goh had told the defendant that the facility for which she was being sued in the present action was one of several facilities that were granted to the defendant's husband by the plaintiff through various nominees as part of a scheme perpetrated by her husband and the plaintiff to circumvent the limit of banking facility that may be granted to a single customer under Singapore law. However, Mary Goh was not willing to affirm any affidavit in support of this allegation. The judge had dismissed the defendant's application on the grounds that the proposed further evidence

A was only a bare allegation and that the facility agreement clearly showed that it was entered into between the plaintiff and the defendant only; that he was unable to see the relevance of the evidence to be adduced and the facility which was granted to the defendant personally; and that he found that the defendant had failed to plead specifically the statute or policy that she alleged
B had been breached. Thus, the judge had held that the defendant had failed to show cause as to why the proposed further evidence should be granted under O 56 r 1(3A) of the Rules of the High Court 1980 ('the RHC'). In her appeal the defendant submitted that the judge had erred in delving into the merits of the defence in dismissing her application under O 56 r 1(3A) of the
C RHC. The defendant contended that in hearing the application the judge had to be satisfied that the fresh evidence was not available at the hearing of the plaintiff's application for summary judgment and that it would have had or likely to have had a determining influence upon the decision of the SAR.

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Held, dismissing the appeal with costs:

(1) (per **Abu Samah JCA**) Although it was not disputed that the further evidence was not available at the hearing of the plaintiff's application
E for summary judgment that by itself did not satisfy the conditions for the admission of further evidence under O 56 r 1(3A). The further evidence must be such that it would have had or would have been likely to have a determining influence upon the decision of the SAR. However, in her statement of defence the defendant neither alleged that
F she was her husband's nominee nor denied executing the facility agreement. As such the further evidence that the defendant now sought to adduce was contrary to the stand taken by her at the hearing of the application for summary judgment and was also in direct conflict with the documentary evidence against her. In fact she opposed the
G application for summary judgment on entirely different grounds and as such the further evidence would not have no relevance to the plaintiff's claim against the defendant and no determining influence on the decision of the SAR (see paras 17–18 & 20).

H (2) (per **Abu Samah** and **Sulaiman Daud JJCA**) Under O 56 r 1(3A) of the RHC the applicant must satisfy both the conditions in paras (a) and (b), which are cumulative and not in the alternative. Although the defendant contended that both conditions had been fulfilled this was not true (see paras 15 & 31–32).

I (3) (per **Sulaiman Daud JCA**) The fresh evidence that the defendant sought to adduce was to the effect that that the facility was given to the defendant as a nominee of her husband and not personally. The defendant sought to use this evidence to show that the facility agreement entered between the parties was illegal and unlawful under

the law of Singapore which set out the limit of banking facilities that may be granted to an individual. However, in order to pursue this line of defence the defendant should have so pleaded in her defence, which she did not do. The present appeal ought to have been dismissed on this ground alone. Further the evidence clearly showed that the defendant had full charge and control of the facility and could not have been her husband's nominee (see paras 33 & 35).

(4) (per **Sulaiman Daud JCA**) In the present case, the defendant by her affidavit sought not only to adduce fresh evidence but also to introduce a new line of defence, which was outside the scope of O 56 r 1(3A) of the RHC and must not be allowed as there must be an end to litigation (see para 36).

[Bahasa Malaysia summary

Menerusi sepucuk surat tawaran bertarikh 24 Julai 1995, plaintif, sebuah syarikat yang diperbadankan di Perancis dan memiliki cawangan di Singapura, memberikan kepada defendan, rakyat Malaysia, kemudahan kredit sebanyak US$7 juta ('kemudahan tersebut'), yang mana tertakluk di bawah undang-undang Singapura. Defendan bersetuju dengan terma dan syarat kemudahan tersebut dan menandatangani surat tawaran tersebut ('perjanjian kemudahan'). Apabila defendan memungkiri terma dan syarat kemudahan tersebut, plaintif memulakan tindakan untuk mendapat semula jumlah yang terakru di bawah kemudahan tersebut bersama faedah dan kos. Pada 24 Jun 2002, penolong kanan pendaftar ('PKP') memberikan penghakiman terus kepada plaintif bagi jumlah yang dituntut bersama faedah dan kos. Defendan merayu terhadap keputusan tersebut, yang mana masih belum selesai. Sementara itu, defendan memfailkan permohonan untuk mengutarakan keterangan lanjut pada pendengaran rayuan. Hakim menolak permohonan tersebut dengan kos, dan maka, rayuan ini. Keterangan yang dipohon oleh defendan untuk diketengahkan ialah berbentuk afidavit, dan merujuk kepada perbualan telefon antara defendan dan Mary Goh, bekas timbalan presiden, timbalan ketua — perbankan persendirian plaintif. Dalam afidavitnya, defendan memberikan keterangan bersumpah bahawa semasa perbualan telefonnya, Mary Goh memberitahu defendan bahawa kemudahan yang mana dia disaman dalam tindakan ini merupakan salah satu daripada kemudahan yang telah diberikan kepada suami defendan oleh plaintif melalui beberapa penama, yang merupakan sebahagian daripada rancangan suaminya dan plaintif untuk memintasi had kemudahan perbankan yang dibenarkan kepada satu pelanggan di bawah undang-undang Singapura. Walau bagaimanapun, Mary Goh masih belum mengesahkan afidavit ini untuk menyokong dakwaan tersebut. Hakim menolak permohonan defendan atas alasan bahawa cadangan keterangan selanjutnya hanyalah merupakan tuduhan yang tidak berasas dan bahawa perjanjian kemudahan tersebut jelas

menunjukkan bahawa ia ditandatangani antara plaintif dan defendan sahaja; bahawa beliau tidak dapat melihat sebarang hubung kait antara keterangan yang hendak dikemukakan dan kemudahan yang diberikan kepada defendan; dan bahawa beliau mendapati defendan gagal memplid secara khusus statut atau polisi yang didakwanya telah dilanggar. Maka, hakim memutuskan bahawa defendan gagal menunjukkan sebab mengapa keterangan seterusnya harus diberikan di bawah A 56 k 1(3A) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Dalam rayuannya, defendan menyatakan bahawa hakim khilaf dalam menyelidik merit pembelaan apabila menolak permohonannya di bawah A 56 k 1(3A) KMT. Defendan berhujah bahawa dalam mendengar permohonan tersebut, hakim harus berpuas hati bahawa keterangan baru tidak didapati pada pendengaran permohonan plaintif untuk penghakiman terus dan bahawa keterangan tersebut akan atau kemungkinan akan mempunyai kesan penentuan atas keputusan PKP.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Abu Samah HMR**) Walaupun tidak disangkal bahawa keterangan lanjut tidak didapati semasa pendengaran permohonan plaintif untuk penghakiman terus, perkara itu sahaja tidak menepati syarat-syarat untuk memasukkan keterangan lanjut di bawah A 56 k 1(3A). Keterangan lanjut itu mestilah akan atau mungkin akan mempunyai kesan penentuan terhadap keputusan PKP. Namun, dalam penyataan pembelaannya defendan tidak menyatakan bahawa dia merupakan penama kepada suaminya atau menafikan melaksanakan perjanjian kemudahan tersebut. Maka, keterangan selanjutnya yang dipohon untuk dikemukakan oleh defendan bercanggah dengan pendiriannya semasa pendengaran permohonan penghakiman terus dan juga bertentangan dengan keterangan dokumentar terhadapnya. Malah, dia menentang permohonan penghakiman terus tersebut atas alasan yang berlainan sama sekali dan oleh itu, keterangan selanjutnya tersebut tidak relevan dengan tuntutan plaintif terhadap defendan dan tiada kesan penentuan terhadap keputusan PKP (lihat perenggan 17–18 & 20).

(2) (oleh **Abu Samah** dan **Sulaiman Daud HHMR**) Di bawah A 56 k 1(3A) KMT pemohon mesti memenuhi kedua-dua syarat dalam perenggan (a) dan (b); yang mana merupakan kumulatif dan bukannya pilihan. Walaupun defendan menyatakan bahawa kedua-dua syarat telah dipenuhi, namun itu tidak betul (lihat perenggan 15 & 31–32).

(3) (oleh **Sulaiman Daud HMR**) Keterangan baru yang ingin dikemukakan oleh defendan menunjukkan bahawa kemudahan tersebut diberikan kepada defendan sebagai penama suaminya dan bukan secara peribadi. Defendan memohon untuk menggunakan

keterangan ini untuk menunjukkan bahawa perjanjian kemudahan yang ditandatangani oleh pihak-pihak adalah menyalahi undang-undang dan tidak sah di bawah undang-undang Singapura yang menghadkan kemudahan perbankan yang boleh diberikan kepada seseorang individu. Walau bagaimanapun, untuk meneruskan dengan pembelaan ini, defendan harus menyatakan dalam pembelaannya, yang mana tidak dilakukan. Rayuan ini harus ditolak atas dasar ini. Selanjutnya, keterangan jelas menunjukkan bahawa defendan mempunyai kuasa dan kawalan penuh atas kemudahan tersebut dan tidak mungkin menjadi penama suaminya (lihat perenggan 33 & 35).

(4) (oleh **Sulaiman Daud HMR**) Dalam kes ini, menerusi afidavitnya, defendan bukan sahaja memohon untuk mengemukakan keterangan baru tetapi juga mahu mengetengahkan pembelaan baru, yang di luar skop A 56 k 1(3A) KMT dan tidak harus dibenarkan kerana sepatutnya wujud pengakhiran dalam litigasi (lihat perenggan 36).]

Notes

For cases on appeal against summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6883–7049.

Cases referred to

Chai Yen v Bank of America National Trust & Savings Association [1981] 2 MLJ 141, FC (refd)

Keng Soon Finance Bhd v MK Retnam Holding Sdn Bhd & Anor [1989] 1 MLJ 457, PC (refd)

Ladd v Marshall [1954] 3 All ER 745, CA (refd)

Lam Soon Cannery Co v Hooper & Co [1965] 2 MLJ 148, FC (refd)

Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70, FC (refd)

Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd [2003] 1 MLJ 6; [2003] 1 CLJ 12, CA (refd)

Tsoi Ping Kwan v Loh Lai Ngoh & Anor [1997] 3 MLJ 165, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 14, O 56 r 1(3A), 1(3A)(a), (b)

Appeal from: Suit No D3–22–1049 of 2001 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (Mathews Thomas Philip and Khor See Yimn with him) (Thomas Philip) for the appellant.

Teng Cheng Hooi (Lee Ong & Kandiah) for the respondent.

Mohd Ghazali FCJ:

[1] I have read the respective judgments in draft of my learned brothers Abu Samah Nordin and Sulaiman Daud JJCA and I agree with them.

Abu Samah JCA:

[2] This is an appeal by the defendant against the decision of the learned High Court judge who dismissed her application to adduce further evidence pursuant to O 56 r 1(3A) of the Rules of the High Court 1980 ('RHC'). For convenience the parties in this appeal are referred to as the plaintiff and defendant just as they were described in the original action.

[3] The facts can be briefly stated as follows. By a letter of offer dated 24 July 1995 the plaintiff granted the defendant a credit facility of US$7m ('the facility') for the purpose of share financing and/or share trading. The defendant agreed to the terms and conditions of the facility and duly signed the said letter of offer ('the facility agreement'). The facility is governed by the laws of Singapore.

[4] When the defendant defaulted on the terms and conditions of the facility the plaintiff commenced an action to recover the balance outstanding under the facility, which stood at US$6,624,735.67 as at 1 June 2001, with interest and costs.

[5] On 24 June 2002 the senior assistant registrar ('SAR') granted summary judgment to the plaintiff for the amount claimed with interest and costs. Being dissatisfied with the said decision, the defendant appealed to the judge in chambers. The appeal is still pending.

[6] In the meantime, the defendant filed an application to the judge in chambers to adduce further evidence at the hearing of the appeal proper. The learned High Court judge dismissed the said application with costs. Hence the appeal before us.

[7] The issue before us is whether the learned judge had applied the correct tests when he dismissed the defendant's application for further evidence under O 56 r 1(3A) of the RHC.

[8] The further evidence that the defendant seeks to adduce at the appeal proper is in the form of an affidavit affirmed by her on 14 March 2003.

[9] In the said affidavit the defendant deposed that on 15 September 2002 she received a telephone call from one Ms Mary Goh, who was formerly the vice president, deputy head — private banking of the plaintiff. She could not be contacted but there was a voice mail message asking her to return the telephone call, which she did on the same day. It was in the course of their telephone conversation that the defendant enquired whether Ms Mary Goh had any information which could be of any assistance to her in respect of the plaintiff's action against her. Ms Mary Goh told the defendant that the facility that she was being sued was one of several facilities that had been established by her husband through various nominees as part of a wider scheme put in place by her husband with the plaintiff to circumvent the single customer limit imposed under the laws of Singapore. Ms Mary Goh also confirmed that the personnel of the plaintiff including one Mr Soh Chye Guan, the then vice president, head — private banking of the plaintiff, were aware of this and participated in the scheme. Both Ms Mary Goh as well as Mr Soh Chye Guan were however unwilling to affirm any affidavit to that effect.

[10] The learned judge dismissed the defendant's application principally on the following grounds. First, he held that the proposed further evidence was just bare allegation as the facility agreement (exh SG-1) was entered into between the plaintiff and the defendant in her personal capacity and not as a nominee for her husband. Secondly, the plaintiff's cause of action against the defendant was based on the facility agreement, which terms and conditions can only bind the parties therein. As such the learned judge was unable to see the relevancy of the proposed further evidence for the purpose of the appeal to the judge in chambers against the SAR's decision. Thirdly, the defendant failed to plead the statute or public policy which the plaintiff was alleged to have contravened leaving the plaintiff helpless to rebut the defendant's allegations specifically. Accordingly, the learned judge held that the defendant had failed to show cause why the proposed further evidence should be granted under O 56 r 1(3A) of the RHC.

[11] Learned counsel for the defendant submitted that the learned judge erred in delving into the merits of the defence in dismissing the defendant's application under O 56 r 1(3A) of the RHC, as the appeal against the summary judgment was still pending.

[12] In their written submissions learned counsel for both parties share the same view that the tests for the admission of fresh evidence under O 56 r 1(3A) of the RHC are as laid down in *Ladd v Marshall* [1954] 3 All ER 745, which tests had been adopted by the Federal Court in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 and referred to by this court in

Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd [2003] 1 MLJ 6. What they disagree is on the sufficiency or materiality of the evidence before us.

[13] In *Ladd v Marshall*, Lord Denning, at p 748 said:

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[14] Suffian FJ (as he then was) in *Lau Foo Sun v Government of Malaysia*, restated the tests as follows:

> To justify the reception of this evidence three conditions must be fulfilled:
>
> First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
>
> Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;
>
> Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible.

These were the tests enunciated by Denning LJ (as he then was) at p 748 in *Ladd v Marshall (1)*.

[15] Paragraph (3A) of r 1 of the RHC was introduced in 1993 by way of an amendment to O 56 of the RHC: see PU(A)192/93. It reads as follows:

> (3A) At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that —
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> (a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
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> (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar.

[16] Under O 56 r 1(3A) of the RHC the applicant must satisfy both the conditions in paras (a) and (b). These conditions are cumulative and not in the alternative. Non-fulfillment of any one of the said conditions may result in the application being dismissed.

[17] Learned counsel for the defendant submitted that the proposed further evidence satisfied the first limb of O 56 r 1(3A) of the RHC as the said telephone conversation occurred on 15 September 2002, well after the SAR had allowed the plaintiff's application for summary judgment. It was further submitted that the said evidence would have had or would have been likely to have had a determining influence on the decision of the SAR for the following reasons:

(a) the defendant was only required to raise a triable issue in an application for a summary judgment;

(b) the illegality or contravention of public policy is a complete defence that can be taken at any stage of the proceedings; and

(c) the further evidence suggested a scheme aimed at circumventing the regulatory framework in Singapore: See *Keng Soon Finance Bhd v MK Retnam Holding Sdn Bhd & Anor* [1989] 1 MLJ 457.

[18] It is not disputed that the further evidence divulged in the course of the telephone conversation was not available at the hearing of the plaintiff's application for summary judgment. But that by itself does not satisfy the conditions for admission of further evidence under O 56 r 1(3A) of the RHC. The further evidence must be such that, if true, it would have had or likely to have had a determining influence upon the decision of the SAR. It is clear that such further evidence would come from the defendant's affidavit alone. The defendant had, in her affidavit candidly admitted that both Ms Mary Goh and Mr Soh Chye Guan were not willing to affirm any affidavit in support thereof.

[19] Learned counsel for the plaintiff had pointed out that the defendant did not allege that she was a nominee of her husband during the application for summary judgment, a fact which would clearly have been within her own knowledge. She never denied executing the facility agreement. In fact she even made a proposal for settlement of the facility in her letter dated 14 December 1998. It seemed to me (without deciding on the merits of the appeal to the judge in chambers) that the further evidence that the defendant sought to adduce would not only be contrary to the stand taken by her at the hearing of the application for summary judgment but it was also in direct conflict with the documentary evidence against her. She opposed the application for summary judgment on entirely different grounds including, among others, that the plaintiff was not a valid legal entity; that the facility agreement was not stamped; that the plaintiff had failed to sell the shares deposited with it, which, if sold, would have been sufficient to settle the outstanding debt; that it was the plaintiff and not her, who breached the terms and conditions of the facility agreement; and that the amount of the

claim was incorrect. It is thus apparent that the further evidence would not have had or likely to have had a determining influence on the decision of the SAR.

[20] I find that the learned judge had scrutinised all the affidavits filed by both parties and considered the submissions by learned counsel carefully. It was the defendant's submission before the learned judge that the proposed further evidence was only available after the summary judgment was entered against the defendant and that the said evidence would have or would likely to have had a determining influence on the decision of the SAR. The plaintiff, on the other hand, contended that the proposed further evidence was just bare allegation unsupported by any document and that it would not have had or would not likely to have had a determining influence on the decision of the SAR.

[21] Having read the judgment of the learned judge, the affidavits of both parties and having considered the submissions on their behalf, I am in agreement with the learned judge that the further evidence had no relevance to the plaintiff's claim against the defendant and would not have had or would not likely to have had a determining influence upon the decision of the SAR. In *Chai Yen v Bank of America National Trust & Savings Association* [1981] 2 MLJ 141 the Federal Court dismissed the appellant's application to introduce fresh evidence, ie a guarantee, in a foreclosure action based on two charges, as being irrelevant.

[22] For the aforesaid reasons, I agreed that the appeal be dismissed with costs and that the deposit be paid out to the plaintiff to account of taxed costs.

Sulaiman Daud JCA:

[23] The plaintiff is a company incorporated in France with a branch office in Singapore. The defendant is a Malaysian citizen with her last known residential address at No 10 Jalan Hujan Rahmat, Oversea Union Garden, 58200 Kuala Lumpur.

[24] By a letter of offer dated 24 July 1995, the plaintiff granted to the defendant a credit facility of US$7m ('the facility'). The facility is governed by the law of Singapore.

[25] When the defendant breached the terms of the facility agreement, the plaintiff commenced the present action to recover the balance outstanding under the facility together with interest. On 24 June 2002, the senior

assistant registrar ('SAR') granted summary judgment to the plaintiff against the defendant for the amount claimed with interest and costs. The defendant appealed to the judge in chambers against the decision.

[26] Prior to the hearing of the said appeal, the defendant applied to the judge for leave, under O 56 r 1(3A) of the Rules of the High Court 1980 ('RHC'), to adduce further evidence at the appeal. The further evidence sought to be adduced is in the form of an affidavit sworn on 14 March 2003 by the defendant herself ('the said affidavit'). The application was refused, and hence the present appeal.

[27] In the said affidavit, the defendant averred that on 15 September 2002 she received a message on her voice-mail from one Ms Mary Goh, who was then the deputy director and an assistant head of the plaintiff's private banking. She returned the call. In the course of the telephone conversation she was told by the said Mary Goh that the facility for which she was being sued in the present action was one of the several facilities that were granted to her husband by the plaintiff through various nominees as part of a scheme perpetrated by her husband and the plaintiff to circumvent the limit of banking facility that may be granted to a single customer under the law of Singapore. Mary Goh also informed her that there were other officers of the bank, including one Mr Soh Chye Guan, who were aware of the scheme.

[28] The learned judge refused to grant leave on three main grounds. First, he was of the view that the evidence sought to be adduced were merely bare allegations as the facility agreement clearly showed that it was entered between the plaintiff and the defendant only. Secondly, he failed to see how such evidence is relevant to the facility in question which was granted to the defendant personally. Thirdly he found that the defendant has failed to plead specifically the statute or policy that had been contravened or breached.

[29] Mr Malik Imtiaz Sarwar, for the defendant, submitted that the learned judge had erred in delving into the merit of the defence in refusing to grant leave. He contended that in hearing the present application, the learned judge was only required to consider whether the further evidence satisfy the test laid down in O 56 r 1(3A) of the RHC. In support of his submission, learned counsel referred to several authorities on this subject, including *Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd* [2003] 1 MLJ 6; [2003] 1 CLJ 12, and *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70.

[30] The principles governing the admission of fresh evidence where there has been 'a trial or hearing on the merits' were laid down by the English Court of Appeal in *Ladd v Marshall* [1954] 3 All ER 745. However, the three

conditions that have to be fulfilled as set out therein are not applicable to interlocutory matters (see *Tsoi Ping Kwan v Loh Lai Ngoh & Anor* [1997] 3 MLJ 165. The power of a judge to admit fresh evidence at the hearing of an appeal in respect of interlocutory matters is provided in O 56 r 1(3A) of the RHC which reads as follows:

> (3A) At the hearing of the appeal fresh evidence shall not be admitted unless the judge is satisfied that:
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> (a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
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> (b) the fresh evidence, if true, would have had or would have been likely to have a determining influence upon the decision of the Registrar.

[31] In *Lam Soon Cannery Co v Hooper & Co* [1965] 2 MLJ 148, it was held that the three conditions set out in *Ladd v Marshall*, for the admission of the fresh evidence are not alternative but cumulative. Likewise, in our observation the two conditions set out in the said rule for the admission of such evidence are also cumulative and not disjunctive.

[32] Learned counsel for the defendant contended that the defendant had fulfilled both the conditions set out by the said rule for the fresh evidence to be adduced at the appeal. He argued that the first condition was satisfied as the telephone conversation occurred on 15 September 2002 after the SAR had allowed the plaintiff's application for summary judgment. He further argued that such evidence would have had or would have been likely to have had a determining influence upon the decision of the SAR.

[33] With respect we are unable to agree with him. The evidence sought to be adduced was to the effect that the said facility was not given to the defendant personally but as a nominee of her husband who had also been granted other such facilities by the plaintiff through other nominees. The defendant seeks to use the fresh evidence to show that the said facility agreement entered between the parties was illegal and unlawful under the law of Singapore which sets out the limit of banking facilities that may be granted to an individual. In our view, to support such line of defence the defendant has to plead, among others, that she entered into the facility agreement with the respondent as a nominee of her husband. However the same was not so pleaded in her defence. Further, we agree with learned counsel for the plaintiff that it is within the defendant's special knowledge whether she signed the facility agreement as the nominee of her husband since she did not deny signing the same. We would dismiss the present appeal on this ground alone.

[34] In addition, we are also in agreement with the learned judge that the defendant had also failed to satisfy the second condition that the further evidence as a whole 'would have had or would have been likely to have a determining influence upon the decision of the registrar'. We observed that the further evidence sought to be adduced is inconsistent and at variance with the evidence adduced in her earlier affidavits opposing the O 14 application. The affidavit evidence clearly showed that the defendant did not deny signing the facility agreement, but instead opposed the said application on the following grounds:

(a) that the said facility agreement (exh 'SG-1') is not admissible in evidence as it was not stamped;

(b) that she did not remember giving instruction to the plaintiff to disburse the said facility;

(c) that she did not make any application to extend the period of the facility exceeding the original period of six months;

(d) that the plaintiff has breached the terms of the facility agreement in not fulfilling her request for the facility to be paid out in Japanese yen;

(e) that the plaintiff has failed to inform her on the status of the share certificates used as security for the facility;

(f) that she denied receiving the notice of demand, or that she has not breached the facility agreement.

[35] The evidence clearly showed that the defendant had full charge and control of the said facility. There is nothing in her affidavit that showed or could be construed as showing that she was a mere nominee of her husband. She made all the positive assertions and denial on her behalf and not as a nominee of her husband. She even submitted her proposal for settlement of the outstanding balance to the bank. As such, we are of the view that the new evidence is of no relevance to the defendant's case and would have no determining influence on the decision of the SAR.

[36] Further, it is clear from the wording of O 56 r 1(3A) of the RHC that it only applies to the introduction of fresh evidence which was not available at the hearing before the registrar. However, in the present case, we observed that the defendant by her affidavit not only seeks to adduce fresh evidence but also to introduce a new line of defence which, in our view, is outside the scope of the said order. It must not be allowed as there must be an end to litigation.

A **[37]** For the reasons aforesaid, we unanimously dismissed the appeal with costs. The orders of the High Court were affirmed, and the deposit to be paid out to the plaintiff to account of taxed costs.

Appeal dismissed with costs.

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Reported by Kohila Nesan

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